No. 10458

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PORTLAND TRUST AND SAVINGS BANK, A CORPORATION, GUARDIAN OF THE ESTATE OF WILLIAM V. MAHONEY, INCOMPETENT, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

PETITION FOR REHEARING

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Comes now the United States of America, appellant in the above-named case, and petitions the court for a rehearing and assigns as reasons therefor the following:

(a) The theory of the Government's case seems clearly not to have been considered by the court. The opinion appears consistent with the view—rejected in all war risk cases in which it has been openly considered—that yearly renewable term insurance is matured by a partial permanent disability having its inception while the insurance is in force and progressing to the degree of total permanent disability after expiration of insurance protection. The Government's

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position that a verdict in its favor should have been directed rests upon the rule frequently set forth in war risk insurance cases, and stated in *Wilks* v. *United States,* 65 F. (2d) 775, 776 (C. C. A. 2), as follows:

> To establish his right to recover, he must prove that he was totally and permanently disabled while his policy was in force. Granted that when discharged from the army he had a disease which was certain to incapacitate him in the future, partially at first and totally in time, such proof is insufficient. A condition of both total and permanent disability must exist before his policy lapsed. * * *

Perhaps the leading case on the point is *Falbo* v. *United States,* 64 F. (2d) 948 (C. C. A. 9), affirmed *per curiam,* 291 U. S. 646, in which a permanent disability, total during the period of insurance protection, was held not to mature the contract because the totality of disability was not shown to have been permanent until insurance protection had expired. See also: *United States* v. *Hainer,* 61 F. (2d) 581, 583 (C. C. A. 9); *Cochran* v. *United States,* 63 F. (2d) 61, 62 (C. C. A. 10); *United States* v. *Gwin,* 68 F. (2d) 124, 126 (C. C. A. 6).

(b) The considerations motivating the decision in *Hoisington* v. *United States,* 127 F. (2d) 746 (C. C. A. 2), and invoked in support of the decision in this case, have been shown by recent decisions of the Supreme Court not to be well founded.

(c) Failure of the Government to except to the instructions to the jury was improperly invoked in support of the decision in this case that the Govern-

ments's motion for a directed verdict was properly denied.

MEMORANDUM IN SUPPORT OF PETITION

The Government is influenced in the filing of this petition less by concern over the disposition of a single case, regarded as wrongly decided, than by an appearance of departure from the long-established principles set forth in the cases on which the Government relied in this appeal.

(a) The opinion fails to disclose consideration of the theory of the Government's case, namely, that although the insured's mental condition may have had its inception while the insurance was in force, and may then have been both permanent and progressive, it was not shown to have become totally disabling during the period of insurance protection, or, indeed, prior to the onset of epileptic seizures, about 1932. Failure to consider the Government's theory of the case is indicated by the opinion, not only because of the lack of any reference to it, but more clearly by the evidence expressly relied upon by the court as contrasted with the evidence not referred to.

The opinion recites, and emphasizes, the testimony of Dr. Evans that in his opinion impairment of the insured's mind—deterioration—existed while the insurance was in force, that deterioration is permanent and for that reason worse than a psychotic condition which sometimes is curable. But the evidence showed also the absence of any proof that mental deterioration is totally disabling from its inception and the positive medical testimony that it is only a *reduction* in mental capacity (R. 384). Moreover, persistent

effort to elicit an opinion from Dr. Evans that something more serious than mere inception of deterioration arose while the insurance was in force (R. 244–251) was unsuccessful.

Specific reference is made in the opinion to the testimony of Dr. Finley that the insured was of unsound mind while his insurance was in force. But the opinion omits reference to the fact that Dr. Finley explained upon cross-examination that by "unsound mind" he meant only "an alteration either in * * * judgment, behavior, memory, or emotional reactions" (R. 275)—words not descriptive of total disability.

Lay testimony pertaining to the insured's conduct while the policy was in force is relied upon in the opinion as tending to show the then existence of some mental abnormality, but the opinion does not refer to the testimony of the same witnesses to the effect that the symptoms described by them were not regarded as indicative of total disability, ie., that he was not insane (R. 86) or irritable to the point of being unpleasant (R. 84); that his personality was changed but not "entirely" changed (R. 95), and that his nonsociability when he was home on furlough was explainable on the ground that by reason of the then exisiting physical illness he spent a great deal of time at home in bed (R. 88–89, 97).

The concession of Government counsel that the insured was totally permanently disabled at the time of trial and for several years prior thereto is referred to in the opinion—in connection with the testimony of Mrs. Mahoney that her husband's condition appeared to be about the same in 1920 as at the time of

trial, except for the seizures—as though it constituted ample justification for the verdict. But the exception in the testimony of Mrs. Mahoney goes to the heart of the Government's case. The concession that the insured had been totally permanently disabled for some time prior to trial was based upon the fact that during recent years, clearly not earlier than 1932, he suffered severe and frequent epileptic seizures. The testimony of Mrs. Mahoney, possibly tending to show the inception of mental abnormality while the insurance was in force, shows the non-existence at that time of the condition admitted by the Government to have caused total permanent disability in recent years. Her testimony and the concession on behalf of the Government may properly be regarded as supplementing each other to show the existence, while the insurance was in force, of the condition later causing total permanent disability, but they tend also to emphasize the absence of total disability while the insurance was in force.

The total lack of significance attributed by the court to the proof that the insured completed a course of vocational training in accountancy is inconsistent, we believe, with an awareness of the theory of the Government's case. If he was able to complete such course of training he was not then totally disabled, since the successful pursuit of such training is the full equivalent of the successful pursuit of a substantially gainful occupation. *Burbage* v. *United States,* 80 F. (2d) 683 (C. C. A. 5); *Blair* v. *United States,* 47 F. (2d) 109 (C. C. A. 8); *Edwards* v. *United States,* 2 Fed. Supp. 49 (D. C. Mass.). Com-

pare *United States* v. *Kerr,* 61 F. (2d) 800, 805 (C. C. A. 9); *Nichols* v. *United States,* 68 F. (2d) 597, 598 (C. C. A. 9).

A recitation in a case history report that the insured was unable to take proper advantage of his training, regarded as sufficient to support an inference that he was disabled, is consistent with the apparent basis of the decision—continued existence of a disability having its inception while the insurance was in force. It constitutes no answer, however, to the Government's position that the permanent disability was not total while the insurance was in force, while the fact of completion by the insured of a course in accountancy during a period of two and one-half years is one of the facts preventing an inference that he was totally disabled during that time.

(b) The considerations motivating the decision in *Hoisington* v. *United States,* 127 F. (2d) 476 (C. C. A. 2d), and invoked in support of the decision in this case, have been shown by recent Supreme Court decisions not to be well founded. It was stated in the *Hoisington case* (pp. 477–478) that—

> Such extended periods of continuous labor after the critical date tend to support the appellant's contention that as a matter of law the insured was not totally disabled before May 31, 1919. Some years ago this court would quite likely have so ruled. In *United States* v. *McDevitt,* 2 Cir., 90 F. 2d 592, at page 595, we said that "A man who can hold jobs for ten and sixteen months at a stretch, is not 'totally disabled,' even though he must give up for a season and seek work anew." But recent decisions of the

> Supreme Court indicate very clearly that the issue of total permanent disability should be left for decision by the jury under proper instructions, rather than determined by the judges. *Berry* v. *United States,* 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945; *Halliday* v. *United States,* Jan. 19, 1942, 315 U. S. 94, 62 S. Ct. 438, 86 L. Ed. ——; see also *Jacobs* v. *City of New York,* March 30, 1942, 314 U. S. ——, 62 S. Ct. 854, 86 L. Ed. ——. * * *.

That the rule governing direction of a verdict had not been changed, as supposed by the court in that case, has now been made clear. Supreme Court decisions rendered after the decision in the *Hoisington* case show that the views attributed by the Circuit Court of Appeals in that opinion to the Supreme Court were in fact the views only of a minority of the Justices of the Supreme Court. See *Galloway* v. *United States,* 219 U. S. 372, in which in the minority opinion the rule applied in the *Hoisington* case is contended for, but in which the majority opinion shows adherence to the rule, thought by the court in deciding the *Hoisington* case to have been abandoned. See also, *Bailey* v. *Central Vermont Ry.,* 319 U. S. 350; *Pence* v. *United States,* 316 U. S. 332; *De Zon* v. *American President Lines,* 318 U. S. 661, affirming a decision of this court, 129 F. (2d) 404. It is clear, we believe, that a different result would be reached in the *Hoisington* case if it were to come on for decision now in the light of the Supreme Court decisions here cited.

(c) Appellate review of a District Court's ruling denying a motion for a directed verdict is not affected by the instructions given to the jury and we believe

it was plainly improper in the present case to predicate an inference adverse to the Government, as the opinion indicates was done, upon its failure to except to the instructions to the jury. Indeed, we have no quarrel with the instructions given in this case. Our position is that the evidence fails to sustain the burden described by the instructions.

CONCLUSION

We respectfully submit that a rehearing should be granted.

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